

67 FLRA No. 83

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 2789
(Union)

0-AR-4895

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DECISION

March 20, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Stanley Kravit concluded that the Agency violated the parties' agreement when it denied a substantial portion of two employees' requests for administrative leave when the employees were unable to report to work as a result of flooding around their homes. There are two primary issues that must be resolved in this case. First, the Agency asserts that the Arbitrator's interpretation of Article 14.I – which concerns administrative leave requests arising from hazardous weather – fails to draw its essence from the parties' agreement. Because this argument is based on the Agency's misunderstanding of the Arbitrator's supplemental award, we find that it does not provide a basis for establishing that the award is deficient. Second, the Agency contends that the supplemental award is based on a nonfact. Because this argument is based on a factual matter that was disputed at arbitration, we find that the Agency's nonfact argument does not provide a basis for overturning the award.

II. Background and Arbitrator's Awards

Article 14.I of the parties' agreement provides in relevant part, that if "hazardous weather or emergency conditions" within an employee's "normal commuting area" prevent the employee from reporting to work, he or

she may request administrative leave.¹ In order to be granted administrative leave under these circumstances, "the employee must provide the employer with evidence that he or she made every reasonable effort to report to work, but that such conditions prevented him or her from doing so."² This article has been a part of the parties' agreement since the Union and Immigration and Naturalization Service – which was later absorbed into the Agency – agreed to it in 1995. The agreement continues to bind the Union and the Agency.

Employees J and H requested 112 and 144 hours of administrative leave, respectively, under Article 14.I of the parties' agreement because they were allegedly unable to report to work as a result of flooding around their homes.³ The Agency granted only sixteen hours of administrative leave to each employee, and the Union filed a grievance challenging the Agency's denial of the bulk of the hours requested.

The grievance was unresolved, and the parties proceeded to arbitration. In his initial award, the Arbitrator framed the issue as whether the Agency violated Article 14.I when it granted only sixteen hours of the administrative leave requested by the employees. He found that the Agency denied the requests because the Agency believed that the employees did not make every reasonable effort to report to work and that, based on their prior experiences, should have relocated to areas that would have permitted them to report to work before the flooding began.

The Arbitrator further found that, under similar circumstances, the Agency approved paid leave in 2009 and administrative leave in 2010 for employee J without requiring him to relocate.

Although the Arbitrator found that these occurrences were insufficient to create a past practice and that Article 14.I was too ambiguous for him to interpret the parties' intent, he concluded that employees J and H were entitled to administrative leave under a theory of equitable estoppel. But he remanded the issue concerning the meaning of Article 14.I to the parties to negotiate over its "interpretation and application."⁴ The Agency filed exceptions to this award, but the Authority dismissed them as interlocutory. The parties were unable to agree as to the meaning of Article 14.I and subsequently requested the Arbitrator's assistance. In his supplemental award, the Arbitrator determined that the interpretation of Article 14.I turned on the validity of the Agency's argument that employees must relocate prior to

¹ Initial Award at 4.

² *Id.*

³ *Id.* at 1-4.

⁴ *Id.* at 23.

a flooding event “in order to preserve their ability to report to work,” but that the parties never contemplated such a requirement.⁵ Instead, the Arbitrator concluded that the parties established “one criteri[on] of eligibility” for the approval of administrative leave – that employees provide evidence that they made “every reasonable effort to report to work,” but that weather or emergency conditions prevented them from doing so.⁶ Accordingly, the Arbitrator concluded that “relocation is not a valid requirement” for determining eligibility for administrative leave under Article 14.I.⁷

The Arbitrator found in “favor of the Union on the [i]ssue as stated.”⁸ He further directed the parties to “appl[y]” his interpretation of Article 14.I to future requests for administrative leave arising from flooding.⁹

The Agency filed exceptions to this award, and the Union filed an opposition to the Agency’s exceptions.¹⁰

III. Preliminary Issue

The Agency filed several exceptions challenging the Arbitrator’s initial award that awarded relief on a theory of equitable estoppel. In particular, the Agency argues that this award is contrary to law and fails to draw its essence from the parties’ agreement insofar as it relies on a theory of equitable estoppel rather than Article 14.I,¹¹ and that the Arbitrator exceeded his authority when he issued the initial award.¹² Because the Arbitrator interpreted Article 14.I in his supplemental award and awarded relief as a consequence of the Agency’s violation of that provision, the supplemental award effectively superseded the initial award. We, therefore, find that it is unnecessary to address the

Agency’s exceptions regarding the Arbitrator’s findings concerning equitable estoppel in the initial award.¹³

IV. Analysis and Conclusions

- A. The Arbitrator’s supplemental award does not fail to draw its essence from the parties’ agreement.

The Agency argues that the Arbitrator’s supplemental award fails to draw its essence from the parties’ agreement. Specifically, the Agency asserts that the Arbitrator disregarded Article 14.I when he ordered the Agency to pay all administrative leave that was requested by the employees under a theory of equitable estoppel.¹⁴

When reviewing an arbitrator’s interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.¹⁵ Under this standard, the Authority will find that an arbitration award is deficient, among other reasons, if it evidences a manifest disregard of the agreement.¹⁶ In addition, when a party does not interpret an award correctly, an exception based on that misinterpretation does not demonstrate that the award fails to draw its essence from the parties’ agreement.¹⁷

The Agency’s argument that the Arbitrator relied on equitable estoppel rather than Article 14.I when he reviewed the parties’ agreement is flawed. In this regard, the Arbitrator’s interpretation of the agreement, as set forth in his supplemental award, does not rely upon the theory of equitable estoppel. Indeed the Agency does not cite any portion of the Arbitrator’s interpretation that explicitly or implicitly refers to equitable estoppel. To the contrary, the Arbitrator found only that the Agency violated its contractual duty under Article 14.I. Because the Agency’s argument is premised on the erroneous assumption that the Arbitrator relied on equitable estoppel rather than the parties’ agreement, we find that the Agency has not established that the supplemental award evidences a manifest disregard of the parties’ agreement.¹⁸

⁵ Supp. Award at 4.

⁶ *Id.* at 5.

⁷ *Id.* at 6.

⁸ *Id.*

⁹ *Id.*

¹⁰ Member Pizzella notes that, in his supplemental award, the Arbitrator did not specifically state whether he was ordering the Agency to grant employees J and H the full amount of administrative leave that they had requested. Although the Arbitrator’s language could be interpreted to say he awarded such relief, it is not clear whether he did so. However, because neither party has made an issue of this ambiguity, Member Pizzella does not believe it is necessary to address it further.

¹¹ See Exceptions at 14-15, 20-21.

¹² See *id.* at 16-18.

¹³ See, e.g., *U.S. Dep’t of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 58 FLRA 77,78-79 (2002) (then-Member Pope dissenting in part).

¹⁴ Exceptions at 21-23.

¹⁵ See, e.g., *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

¹⁶ See *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

¹⁷ E.g., *U.S. Dep’t of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 572 (2011).

¹⁸ *Id.*

- B. The Arbitrator's supplemental award is not based on a nonfact.

The Agency alleges that the supplemental award is based on a nonfact because the Arbitrator erroneously found that the Agency required all of its employees to relocate prior to any flooding.¹⁹ The Agency argues that it merely suggested that relocating "to a safe location . . . might be a prudent choice" prior to any flooding.²⁰

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.²¹ However, the Authority will not find an award deficient on the basis of an arbitrator's determination of a factual matter that the parties disputed at arbitration.²²

The Agency directly challenges a factual matter that was disputed at arbitration, i.e., whether the Agency required employees to relocate prior to any flooding.²³ Therefore, consistent with the legal principle set forth above, we find that the Agency's argument does not establish that the supplemental award is based on a nonfact.²⁴

V. Decision

We deny the Agency's exceptions.

¹⁹ Exceptions at 24.

²⁰ *Id.*

²¹ *E.g., U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry AFB*).

²² *See id.* at 593-94.

²³ *See Supp. Award* at 2-3; *see also Initial Award* at 13.

²⁴ *Lowry AFB*, 48 FLRA at 593.